122-627-629.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 263.

CHESTER A. ARTHUR, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

THOMAS BARBOUR AND ROBERT BARBOUR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 21, 1883.



accession 25847

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Thomas Barbour & Robert Barbour, plaintiffs, and Chester A. Arthur, defendant, a manifest error hath happened to the great damage of the said Chester A. Arthur, as by his complaint appear. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-three, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 1st day of March, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed.

WM. J. WALLACE.

2 (Indorsed:) 5077. U. S. Supreme Court. Chester A. Arthur, plaintiff in error, against Thomas Barbour and Robert Barbour, defendants in error. Writ of error. S. L. Woodford, attorney for plaintiff in error. Service of a copy of the within writ of error is hereby admitted this 3rd day of March, 1883. Martin & Smith, attorneys for defendant in error. To Messrs. Martin & Smith, attorneys for defendants in error.

(Indorsed in pencil:) A. & E., A. 403.

(Stamped:) U. S. circuit court. Filed Mar. 3, 1883. Timothy Griffith, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York in the second circuit, by virtue of the foregoing writ of error, and in obedience
3 thereto, do hereby certify that the following pages, numbered from four to thirty-four, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Chester A. Arthur, plaintiff in error, against Thomas Barbour and Robert Barbour, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York,

in the second circuit, this twentieth day of August, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

[SEAL.]

4 Circuit court of the United States of America, for the southern district of New York, in the second circuit.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

To the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit:

Petitioner and affiant respectfully showeth that he was, prior to the commencement of the suit hereinafter referred to, collector of the customs for the port and district of the city of New York, duly appointed according to law; and that on or about the 7th day of May, 1877, a suit was commenced against him by Thomas Barbour and Robert Barbour in the supreme court of the State of New York, for or on account of acts done by him under the revenue laws of the United States, and as such collector; and that he has been served with process in said suit in said southern district, and that no trial has been had in said cause.

He therefore prays that, in pursuance of the act of Congress in such case made and provided, the said cause so commenced in the said supreme court may be removed therefrom and entered on the docket of this honorable court, and thereafter proceeded in as a cause originally commenced in this court. And he will ever pray, etc.

And being duly sworn, deposes and says, that the matters hereinbefore set forth are true to the best of his knowledge, information, and belief.

C. A. ARTHUR.

Sworn to before me, this 7th day of June, A. D. 1877.

D. F. PHELPS,
Notary Public, County N. Y.

I certify that, as counsel for the petitioner, I have examined into the proceedings against him, and have carefully inquired into all the matters set forth in the within petition and affidavit, and that I believe the same be true.

New York, June 7, 1877.

STEWART L. WOODFORD,
U. S. Attorney, Counsellor of the said Circuit Court.

5 (Indorsed:) 5077. A 685. U. S. circuit court. Thomas Barbour & ano. vs. Chester A. Arthur. Petition to remove cause. Stewart L. Woodford, United States attorney, attorney for defendant. U. S. circuit court. Filed June 18, 1877. John I. Davenport, clerk.

6 The President of the United States of America to the judges of the supreme court of the State of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against Chester

A. Arthur, defendant, by Thomas Barbour and Robert Barbour, plaintiffs, do therefore command you that the record and proceedings in said cause you distinctly and openly send to the said circuit court at the city of New York, on the 25 day of June, 1877, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 18 day of June, in the year one thousand eight hundred and seventy-seven.

[SEAL OF COURT.] JOHN I. DAVENPORT, *Clerk.*
STEWART L. WOODFORD,
Defendant's Attorney.

7 (Indorsed:) 5077. A. 685. U. S. circuit court. Thomas Barbour & ano versus Chester A. Arthur. Certiorari. Stewart L. Woodford, defendant's attorney. U. S. circuit court. Filed Dec. 28, 1877. John I. Davenport, clerk.

I have this day personally served upon the clerk of the supreme court of the State of New York a duplicate of the within writ, at the same time showing the original.

LOUIS F. PAYN,
U. S. Marshal.

Dated June 23, 1877.

Marshal's fees for service, 2.00; travel to serve, 12—2.12.

8 United States circuit court, southern district of New York.—Commenced May 7, '77.

THOMAS BARBOUR & ROBERT BARBOUR
against
CHESTER A. ARTHUR. } No. .

You will please take notice that the defendant demands a copy of plaintiffs' complaint, and that a rule has this day been entered in the book of common rules, kept in the office of the clerk of this court, requiring the plaintiff to file and serve declaration in this cause within twenty days after service of a notice of the entry of said rule, or be non-prossed.

New York, June , 1877.

STEWART L. WOODFORD,
United States Attorney for Defendant.

To MARTIN & SMITH,
Attorney' for Plaintiff.

9 (Indorsed:) 5077. 685. U. S. circuit court. Thomas Barbour & ano against Chester A. Arthur. Notice of entry of rule to declare. Stewart L. Woodford, United States attorney for defendant. U. S. circuit court. Filed June 9, 1877. John I. Davenport, clerk.

10 Folio 1. United States circuit court, for the southern district of New York, in the second circuit at the April term, in the year one thousand eight hundred and seventy-seven.

THOMAS BARBOUR AND ROBERT BARBOUR,
agst.
CHESTER A. ARTHUR.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

The above named plaintiffs in this suit come into court and, by Martin & Smith, their attorneys, give the court now here to be informed that heretofore, to wit, on the 7th day of May last past, this action was commenced in the supreme court of the State of New York, city and
11 county of New York, according to the laws of the State of New York, and the rules and practice of said court, in favor of said plaintiffs, and against the defendant herein, upon the cause of action hereinafter set forth and the summons therein, filed with the clerk of said court. That the defendant afterwards, by his attorney, Stewart L. Woodford, esq., duly appeared in said action, and thereupon, on the 18th day of June, 1877, the said action was duly removed, by writ of certiorari, for further prosecution, into this court, according to the act of Congress in such case made and provided, and the clerk of the said court did thereupon return the said writ with the said summons and duly filed the same in this court, wherefore the further proceedings and trial of this action are continued in this court.

And the said plaintiffs, by their said attorneys, complain of said defendant:

First. That defendant was, during the times hereinafter named,
12 collector of customs of the United States at the port of New York.

Second. That plaintiffs were, during said time, partners in trade, under the firm name of Barbour Brothers, and as such duly imported and entered at the port of New York the goods described in the bill of particulars hereto annexed.

Third. That the defendant, as such collector, exacted from the plaintiffs, as and for duties upon said goods, the sum of two thousand four hundred and forty-nine .95 in gold coin.

Fourth. That by the laws of the United States, the said goods were exempt from duty, but that the plaintiffs, in order to obtain said goods, were compelled to pay the said sum of two thousand four hundred and forty-nine .95 dollars in gold coin.

Fifth. That plaintiffs filed with said defendant due and timely protest in writing upon each entry of said goods, against his decision ex-
13 acting such duty, setting forth distinctly and specifically the grounds of their objection thereto.

Sixth. Plaintiffs also made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of the defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeal, and more than ninety days have elapsed since said unanswered appeal, when this action was commenced.

Seventh. That the bill of particulars hereto annexed sets forth each importation separately, the date of entry at the custom-house, of the payment of duty in excess of the filing of said protest, and also the date of the appeals to the Secretary of the Treasury and of his decision thereon, and the
14 other particulars required by law, and is made a *a* part thereof.

Eighth. That said sum of two thousand and four hundred and forty-nine .95 dollars in United States gold coin, so exacted has never been repaid to plaintiffs and is still due and owing to them. Wherefore plaintiffs demand judgment against said defendant for the sum of two thousand four hundred and forty-nine .95 dollars in United States gold coin, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby.

MARTIN & SMITH,
Plaintiff's Attorneys.

THOMAS BARBOUR & ROBERT BARBOUR
agst.
CHESTER A. ARTHUR.

Name of importer.	Description of merchandise.	Place from which imported.	Name of vessel by which imported.	Date of invoice.	Date of entry at custom-house.	Precise amount of duties claimed to have been exacted in excess.	Date of payment of duties.	Day & year in which protest was filed ag'st exaction.	Date of appeal to Secretary of Treasury.	Date of decision of appeal by Secretary of the Treasury.
Thomas Barbour & Robert Barbour doing business as Barbour Brothers.	Machinery not now manufactured in the United States, adapted exclusively to manufactures from the fiber of the ramie, jute or flax, as follows:									
	1 drawer frame	Liverpool.	Russia	Sept. 16, 1875	.....	202 50 gold	Oct. 8, '75, $160 10 Dec. 11, " 42 40	Dec. 13, '75	Dec. 13, 1875	Feb'y 9, 1876
	1 balling machine	" ..	Algeria ...	Dec. 10, 1875	.....	180 90 "	March 4, '76,	Mar. 7, '76	Mar. 7, 1876	Jan'y 18, '77
	" " "	" ..	Parthia ...	" 17, 1875	.....	173 25 "	" 6, '76,	" " "	" " "	" " "
	" " "	" ..	Russia....	Jan'y 1, 1876	.....	180 90 "	" 4, '76,	" " "	" " "	" " "
	" " "	.....	Celtic.....	" 26, 1876	.....	171 25 "	Feb'y 9, " $134 75 May 5, " 36 50	May 4, "	May 4, "	Ap'l 10,
	1 twisting frame	" ..	Russia....	Feb'y 9, "	.....	229 95 "	Feb'y 28, " $178 85 Oct. 19, " 51 10			
	2 balling machines.....	" ..	China.....	" 16, "	.....	346 50 "	Mar. 4, " 269 50 July 5, " 77	July 10, "	July 10, "	" " "
	2 " "	" ..	Abysinia .	Mar. 1, "	.....	346 50 "	Mar. 20, " 269 50 June 3, " 77	June 5, "	June 5, "	Jan'y 18, "
	1 drawing frame	" ..	China.....	" 20, "	.....	290 25 "	Ap'l 6, " 225 75 " 7, '77, 64 50			
	2 dry skimming frames ..	" ..	China.....	Sept. 23, "	.....	294 35 "	Oct. 18, '76.			
	1 hackle drilling machine.	" ..	Spain	Jan'y 9, 1877	.....	33 60	Jan'y 29, 1877.			
						2,449 95*				

* Footing in pencil in original.

Take notice that the above is a bill of the particulars of the plaintiffs claim in this action.

Dated New York, June 7, 1877.

MARTIN & SMITH,
Pl'ff's Att'ys.

To STEWART L. WOODFORD, Esq.,
Def't's Att'y.

STATE OF NEW YORK,
City & County of New York, ss:

Thomas Barbour, being duly sworn, says he is one of the plaintiffs in this action, that the foregoing is a bill of particulars in the above-entitled action, & that he believes the same to be true.

THOMAS BARBOUR.

Sworn to before me this 7th day of June, 1877.
[SEAL.] WM. B. LYNES,
Notary Public, Kings Co., with certificate filed in N. Y. Co.

16 (Original endorsed:) Supreme Court. Thomas Barbour & ano. ag'st Chester A. Arthur. Bill of particulars. Martin & Smith, pl'ffs att'ys. One service of a copy of the within bill of particulars & of a notice of which the within is a copy is hereby admitted. Dated June 7, 1877. Stewart L. Woodford, U. S. Attorney, att'y for def't.

17 (Original endorsed:) U. S. circuit court. Thomas Barbour & ano. ag'st Chester A. Arthur. Original declaration & bill of particulars. Martin & Smith, pl'ffs att'ys. U. S. circuit court. Filed July 18, 1877. John I. Davenport, clerk.

18 (62.)

United States circuit court, southern district of New York.

THOS. BARBOUR & ANO.
against
CHESTER A. ARTHUR. } Plea.

And the said defendant, Chester A. Arthur, by Stewart L. Woodford, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared, against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, etc.

STEWART L. WOODFORD,
United States Attorney for Defendant.

To MARTIN & SMITH, Esqs.,
Plaintiffs Attorney.

19 (Indorsed:) 5077. 685. U. S. circuit court. Thos. Barbour & ano. against Chester A. Arthur. Plea. U. S. circuit court. Filed July 20, 1877. John I. Davenport, clerk.

20 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the 9th day of May, in the year of our Lord one thousand eight hundred and eighty-two. Present, the honorable Nathaniel Shipman, judge.

THOMAS BARBOUR ET AL. *vs.* CHESTER A. ARTHUR. } 5077.

On motion of M. W. Divine, esqr., of counsel for the plaintiffs in the above-entitled action, ordered trial.

Jurors sworn: Wm. P. Roberts, Alex. T. Slaughter, Sidney T. Smith, Peter Valentine, Gilbert D. Case, Sidney A. Phillips, Geo. L. McAlpine, Thos. Mills, Marks Celler, Zacheriah Dedrick, Joseph H. Risley, Edgar B. Banks.

Mr. Divine opens the case on the part of the plaintiffs.

Evidence for the plaintiffs.

THOS. BARBOUR sworn:

21 A. B. Herrich, ass't U. S. attorney, of counsel for the defendant, waives the opening of the case, on the part of the defendant, and introduces no evidence on his behalf.

Mr. Divine moves that the court direct the jury to find a verdict for the plaintiffs for the sum of $2,449.95, with legal interest thereon from the fifth day of May, 1876.

Mr. Merrick not opposing, the court directs the jury to find a verdict for the plaintiffs in the sum of $2,449.95, with legal interest thereon from the fifth day of May, 1876.

The jury say that by direction of the court they find a verdict for the plaintiffs in the sum of twenty-four hundred and forty-nine dollars and ninety-five cents, with legal interest thereon from the fifth day of May, 1876, and so say they all.

On motion of Mr. Merrick, ordered that the defendant have a stay of proceedings herein for thirty days. On like motion it is ordered that a certificate of probable cause be entered herein.

A copy from the minutes.

J. M. DEUEL,
Clerk.

22 The foregoing verdict reduced by consent and on order of the court dated Jan'y 4, 1883, to $2,122, with interest thereon from May 5, 1876. See order on file.

J. M. D.

23 U. S. circuit court, southern district of New York.

THOMAS BARBOUR & ROBERT BARBOUR *against* CHESTER A. ARTHUR. } Postea.

Be it remembered that heretofore the above entitled cause having come duly on for trial before the honorable Nathaniel Shipman and a jury, and

the plaintiffs being represented by Messrs. Martin & Smith, their attorneys, and the defendant by the honorable Stewart L. Woodford, U. S. district attorney, and said cause having been tried, and the said jury having found a verdict for the plaintiffs by direction of the court for the sum of $2,449.95, with legal interest thereon from the fifth day of May,
24 1876, on motion of Martin & Smith, plaintiffs' attorneys, it is—

Ordered, adjudged, and decreed that Thomas Barbour and Robert Barbour, the plaintiffs, do recover against Chester A. Arthur, the defendant, the said sum of two thousand four hundred and forty-nine .95 dollars, the amount of said verdict, with nine hundred and ninety-one .21 dollars interest thereon, amounting to the sum of three thousand four hundred and forty-one .16 dollars, and the further sum of fifty-three dollars and sixty cents the costs of this action, as taxed, amounting in the aggregate to the sum of three thousand thirty-four dollars and ten cents.

Dated N. Y., June 23, 1882.

Judgment signed this .

J. M. DEUEL, *Clerk.*

(On margin:) $2,449.95
991.21

3,441.16
53.60

3,494.76. Reduced by order of the court Jan. 4, 1883. See same on file.

25 (Endorsed:) U. S. C. C. S. D. of N. Y. Thomas Barbour & ano'r, vs. Chester A. Arthur. Judgment roll. U. S. circuit court. Filed June 23, 1882. J. M. Deuel, clerk.

26 At a stated term of the circuit court of the United States for the southern district of New York, held at the court rooms, at the city of New York, the 4th day of January, 1883. Present, Hon. , judge.

THOMAS BARBOUR AND ROBERT BARBOUR
against
CHESTER A. ARTHUR. } No. 5077.

On reading and filing the annexed stipulation of plaintiffs' attorneys, and on motion of Martin & Smith, plaintiffs' attorneys—

It is ordered that the verdict rendered in the above-entitled action on the 9th day of May, 1882, for the sum of $2,449.95, with interest thereon from May 5, 1876, and it is further ordered that the judgment entered here on said verdict on the 23d day of June, 1882, for the sum
27 of $3,494.76 be, and the same hereby is, reduced to the sum of 3,034.10.

ADDISON BROWN.

I consent to entry of order in above terms without prejudice to the question whether judgment for the reduced amount is proper.

S. L. WOODFORD, c.,
U. S. Att'y.

NEW YORK, *Jan'y* 4, 1882.

16413——2

28 Circuit court of the United States, southern district of New York.

THOMAS BARBOUR AND ROBERT BARBOUR
against
CHESTER A. ARTHUR. } No. 5077.

It is hereby stipulated by and on behalf of the plaintiffs in the above-entitled action that the verdict herein and the judgment entered thereon on the 23d day of June, 1882, be modified by deducting from the amount of said verdict ($2,449.95) the sum of $294.35 and $33.60 (amounting together to the sum of $327.95), and by deducting from the amount of said judgment ($3,494.76) the said sum of $327.95 and interest thereon from May 5, 1876, to June 23, 1882 (amounting in the aggregate to the sum of $460.70).

Dated New York, December 30, 1882.

MARTIN & SMITH,
Plaintiffs' Attorneys.

29 (Endorsed:) United States circuit court, southern district of New York. Thomas Barbour & ano'r against Chester A. Arthur. H. H. M. Stipulation and order reducing verdict. Martin & Smith, plaintiffs' attorneys, 50 Wall st., N. Y. City. U. S. circuit court. Filed Jan. 4, 1883. Joseph M. Deuel, clerk.

30 Supreme Court of the United States.

CHESTER A. ARTHUR, PLAINTIFF IN ERROR,
against
THOMAS BARBOUR AND ROBERT BARBOUR, DEFENDANTS IN ERROR.

Assignment of error.

Afterwards, to wit, on the second Monday of October, in the same term before the justices of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by Stewart L. Woodford, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendants.

And in this, to wit, that by the record it appears that the only importations of the defendants in error, in respect of which the require-
31 ments of law respecting appeals to the Secretary of the Treasury, and respecting the time within which suit must be brought after the decision of such appeals were complied with, were the importations by the Celtic, January 26, 1876, and by the China, Feb'y 16, 1876; that the amount of duty exacted and paid in excess of legal duties upon those importations did not exceed the sum of $517.75; that nevertheless the said judgment is for an amount largely in excess of said sum $517.75 and interest thereon.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

S. L. WOODFORD,
U. S. Att'y for Pl'f in Error.

32 (Endorsed:) 5077. U. S. Supreme Court. Chester A. Arthur, plaintiff in error, against Thomas Barbour & Robert Barbour, defendants in error. Assignment of error. Stewart L. Woodford, United States attorney, attorney for plaintiff in error. Service of a copy of the within is hereby admitted, New York, March, 3d, 1883. Martin & Smith, attorneys for defendants in error. To Messrs. Martin & Smith, attorneys for defendants in error. U. S. circuit court. Filed Mar. 3, 1883. Timothy Griffith, clerk.

33 UNITED STATES OF AMERICA, *ss:*

To Thomas Barbour and Robert Barbour, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-three, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Chester A. Arthur is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf. Dated, March 1st, 1883.

WM. J. WALLACE,
Circuit Judge.

34 (Indorsed:) 5077. U. S. Supreme Court. Chester A. Arthur, plaintiff in error, against Thomas Barbour and Robert Barbour, defendants in error. Citation. S. L. Woodford, attorney for plaintiff in error. Service of a copy of the within citation is hereby admitted this 3d day of March, 1883. Martin, and Smith attorneys for d'f'ts in error. To Messrs. Martin & Smith, attorneys for defendants in error.

(In pencil:) E. & A. A. 403.

(Stamped:) U. S. circuit court. Filed Mar. 3, 1883. Timothy Griffith, clerk.

(Indorsement on cover:) No. 263. Chester A. Arthur, late collector of the port of New York, plaintiff in error, vs. Thomas Barbour and Robert Barbour. S. New York C. C. U. S. Filed 24th August, 1883.

122-627-629

Supreme Court of the United States.

No. 26.

CHESTER A. ARTHUR, late Collector of the Port of New York,

Plaintiff in Error,

against

THOMAS BARBOUR and ROBERT BARBOUR,

Defendants in Error.

Statement and Brief for Defendants in Error.

MARTIN & SMITH,
Attorneys for Defendants in Error,
50 Wall Street,
New York City.

New York:
Charles S. Hamilton & Co., Printers, 12 Barclay Street.

1886.

SUPREME COURT

OF THE UNITED STATES.

CHESTER A. ARTHUR, late Collector of the Port of New York,

Plaintiff in Error,

against

THOMAS BARBOUR and ROBERT BARBOUR,

Defendants in Error.

Statement and Brief for Defendants in Error.

STATEMENT.

Action commenced May 7th, 1877, in the Supreme Court of the State of New York (fols. 5 and 11). Removed by certiorari to Circuit Court of the United States for the Southern District of New York June 25th, 1877 (fol. 7). The complaint (not verified) states that the plaintiff in error (defendant below) was collector of the Port of New York. That defendants in error (plaintiffs below) imported and entered at said port certain machinery adapted exclusively to manufactures from the fibre of the ramie, jute or flax. That defendant, as

such collector, exacted from the plaintiffs for duty on said goods, $2,449.95. That said goods were, by law, exempt from duty (Act of 1875, 18th Statutes, p. 307, sec. 7), but that plaintiffs, in order to obtain possession of them, were compelled to pay said $2,449.95 (fols. 12 to 14). That before suit brought, plaintiffs made due and timely protest and due and timely appeal to the Secretary of the Treasury on each entry, and brought suit within the time prescribed by law (fol. 13).

The answer or plea (also not verified) was a general denial, or *non-assumpsit* (fol. 19).

The case was tried before his Honor Judge Nathaniel Shipman and a jury on May 9th, 1882. The record (fols. 20, 22) shows:

First.—That after plaintiffs called witnesses, introduced evidence and proved their case, defendants' counsel, the U. S. District Attorney, waived the opening of the case on the part of the defendant, and introduced no evidence on his behalf.

Second.– That plaintiff's counsel thereupon moved the Court to direct a verdict for the plaintiffs for $2,449.95, with legal interest thereon from the 5th day of May, 1876, *and defendant's counsel not opposing*, the Court directed the jury to find a verdict accordingly.

Third.—That no exception was taken by defendants' counsel to that direction.

Fourth.—Thereupon "the jury say that, by direction of the Court, they find a verdict for the plaintiffs in the sum of $2,449.95, with interest thereon from May 5, 1876."

Fifth.—That defendants' counsel then procured a stay of proceedings on the verdict for thirty days, and a certificate of probable cause.

Sixth. That afterwards, on June 23, 1882, judgment was entered in favor of plaintiffs for the amount of said verdict, namely, $2,449.95
and interest thereon, viz., 991.21
and costs, 53.60

Total $3,494.76

Seventh.—That afterwards, and on January 4, 1883, that judgment was, by consent, reduced to $3,034.10 (fol. 27).

Afterwards, on March 1st, 1883, a writ of error was allowed directed to the Clerk of the said United States Circuit Court, commanding him to send the record and proceedings aforesaid, with all things concerning the same, to this Court on the second Monday of October, 1883.

In obedience to that writ, the Clerk, on August 20, 1883, made his return of the record and proceedings aforesaid, which return or transcript of record was filed on August 24th, 1883.

There is no bill of exceptions nor case containing any of the evidence presented at the trial. The case comes here, and is to be heard and determined solely on the record.

Two alleged errors are assigned (fol. 31), viz.:

First.—That the judgment ought to have been given for the plaintiff in error against the defendants in error.

Second.—That the only importations, in respect of which the requirements of law respecting ap-

peals to the Secretary of the Treasury, and respecting the time within which suit must be brought after the decision of such appeals were complied with, were the importations by the *Celtic*, January 26, 1876, and by the *China*, February 16, 1876; that the amount of duty exacted and paid in excess of legal duties upon these importations did not exceed $517.75, while the judgment is for an amount in excess of that sum.

Brief for Argument.

I.

In the absence of proof to the contrary, it must be presumed that plaintiffs proved on the trial the several facts entitling them to the verdict and judgment which they recovered.

The rule is well settled that when a case is heard in an appellate court on a writ of error, only such errors as are plainly made to appear can be grounds of reversal, and that every presumption consistent with the record is to be made in favor of the action of the inferior court.

Loring *vs.* Frue, 104 U. S., 224.
Mays *vs.* Fritton, 20 Wall., 414.
Upton *vs.* McLaughlin, 105 U. S., 646.
Ventress *vs.* Smith, 10 Peters, 161.
Dobson *vs.* Campbell, 1st Sumner, 319.
Miner *vs.* Mechanics' Bank, 1st Peters, 67.
Brents & a. vs. Bank &c 80 00, 92-3.

Upon the issues as framed by the pleadings, the burden was upon plaintiffs to prove the allegations

of their complaint, and from the record it must be presumed that they did so in order to entitle them to the verdict and judgment which they recovered. But aside from this presumption, we submit that the record shows affirmatively that such proof was made by plaintiffs. It appears (fols. 20, 21) that plaintiffs' counsel opened the case, called a witness and introduced evidence presumably to prove plaintiffs' case; that after the close of plaintiffs' evidence the U. S. District Attorney, of counsel for the defendant, waived the opening of the case on the part of the defendant and introduced no evidence on his behalf (fol. 21), thereby substantially conceding that plaintiffs' case against defendant had been conclusively proved and that it would be idle for him to open or to introduce evidence for the defendant.

If there were any errors in plaintiffs' bill of particulars, such as alleged in the second assignment of error, it must be presumed that such errors, if any, were corrected on the spot For if plaintiffs had failed to prove the allegations of their complaint, it would have been the duty of defendant's counsel to move for judgment of non-suit or dismissal, and it cannot be assumed, in the absence of evidence, that the U. S. District Attorney, an officer of the Court, as well as an officer of the Government, neglected or omitted to perform what would have been his plain duty.

If there were any doubt upon this point it would be removed by what next appears by the record, viz., when defendants' counsel made the above announcement; plaintiff's counsel moved that the Court direct the jury to find a verdict for the plaintiffs for the sum of $2,449.95, with legal interest thereon from May 5th, 1876, *and defendants' counsel not opposing*, the *Court* directed the jury to find a verdict accordingly. To entitle the Court to

grant that motion, and to direct the jury to find that verdict, it is plain that plaintiffs must have proved to the satisfaction *of the Court*, as well as of the defendants' counsel, all the allegations of their complaint entitling them to a verdict and judgment against the defendant. In the absence of any evidence on the subject in the record, it cannot be assumed that the Court granted that motion and gave that direction in the absence of sufficient and satisfactory proof.

We therefore submit that on the record as now presented to this Court it must be presumed:

First.—That plaintiffs proved their case so as to entitle them to their verdict and judgment.

Second.—We submit that the record affirmatively, even if inferentially, establishes that they did so prove their case.

Third.—We claim that if their case were so proved to the satisfaction of counsel, court and jury, it must be assumed that all errors of dates or figures in the bill of particulars or complaint were corrected, and it cannot be assumed nor presumed that there is any foundation in fact whatever for the second assignment of alleged error.

II.

In actions at law, the practice in the Federal Courts has been conformed to that in the State Courts.

R. S., Sec. 914.

According to the New York practice, each party must raise his objections in the court of first instance, and if he omit to do so, the judgment of that court will not be reversed on appeal upon any objection first raised on the argument of the appeal. This was decided long ago by the old Court of Errors in a very forcible opinion.

Gelson *vs.* Hoyt, 13 Johns., 561.

See also

Flake *vs.* Van Wagenen, 54 N. Y., 27.

The precise objection which the plaintiff in error seeks to raise in the case at bar is that *the bill of particulars does* not show certain facts essential to recovery.

But it is the invariable rule of practice in New York that the objection of insufficiency in a pleading must be taken at the trial, and passed on by the Court, or it cannot be urged on appeal.

Thayer *v.* Marsh, 75 N. Y., 342.

In the case at bar the complaint states a perfect cause of action, and no objection can even now be made, except to the bill of particulars. But a party is allowed to prove facts in addition or contradiction to his bill of particulars, unless his adversary objects, and even when objection is made the Court may, at the trial, allow him to amend his bill of particulars, and this, of course, is done by an oral ruling.

Del. and Hud. Canal Co. *v.* Dubois, 15 Wend., at p. 91.

Duncan *v.* Ray, 19 Wend., 530.

Melvin *v.* Wood, 3 Keyes, 535.

Aside from the clerk's minutes, the plaintiff in error has seen fit not to bring up any of the evidence of the proceedings that were had on the trial. Can a party be permitted, after a trial has

taken place, to omit or suppress the testimony and ask for a reversal, solelely on the face of the bill of particulars as served? We submit that, on the contrary, every presumption on appeal is in favor of the judgment appealed from.

Loring *vs.* Frue, 104 U. S., at p. 224.
The *Potomac*, 2 Black, at p. 584.
First Nat'l Bk. *v.* Kelly, 57 N. Y., at p. 39.
Best *v.* Staple, 61 N. Y., at p. 78.

The case at bar is an eminently fitting one for the application of this maxim. If the facts specified in the second assignment of error were true, no one would have had better knowledge of this than the defendant below. Yet the record shows affirmatively that no objection was made by his counsel, after listening to plaintiff's evidence to the direction of a verdict in plaintff's favor.

See also Code Civil Procedure. N. Y., secs. 721 to 723, and sec. 997.

III.

The verdict of the jury having been directed at the request of plaintiffs and with the acquiescence of defendants, no errors can be considered in this Court which were waived by such acquiescence.

Pacific R. R. *vs.* Ketchum, 101 U. S., 289.
U. S. *vs.* Babbitt, 104 U. S., 767.

As already stated, it appears by the record that after plaintiffs opened and proved their case, defendant, by his counsel, waived the making of any defense, and introduced no evidence on his behalf.

It thereupon became proper for plaintiffs' counsel to move the Court to direct a verdict for plaintiffs for the amount claimed and interest, which motion was accordingly made, and *defendants' counsel not opposing* (fols. 21, 22), it became and was the duty of the Court to grant it, and to direct the jury as requested. The jury having been so directed, it became and was its duty to render its verdict accordingly; no error was committed by the Court in directing the verdict; no exception was taken to that direction; on the contrary, defendants' counsel, in open Court, distinctly acquiesced in it (fols. 21, 22). We therefore submit that the rule established in the cases above cited should be applied to the present case and if it be applied, the alleged errors assigned on behalf of defendants were necessarily waived and cannot be considered on this appeal.

IV.

It has been held that this Court has power to review and reverse, on writ of error, judgments by default where the declaration fails to set forth a cause of action, or in contested cases, where plaintiffs' claim, as stated in the declaration, is fatally defective.

McAllister *vs.* Kuhn, 96 U. S., 87.
Cragin *vs.* Lovell, 109 U. S., 199.
Garland *vs.* Davis, 4 How., 131.
Slacum *vs.* Pomery, 6 Cranch, 221.

But the present is not a case of that description. The declaration states a cause of action and avers compliance by plaintiffs with the several conditions entitling them to bring suit. The defendant

filed his plea to the declaration. The issues were tried before the Court and jury, both principals appearing by counsel, and a verdict was directed and rendered in due form of law on the application of plaintiffs' counsel, and with the acquiescence of the defendant.

According to the practice in the State of New York, an order or judgment taken by default is not appealable.

Flake *vs.* Van Wagenen, 54 N. Y. 25.

V.

We submit that the judgment should be affirmed with costs.

MARTIN & SMITH,
Atty's for Defendants in Error.

AARON PENNINGTON WHITEHEAD, and
M. W. DEVINE,
Of Counsel.